

CO-OPTING FOR GOVERNANCE: THE USE OF THE CONDITIONS POWER BY THE ACCC IN AUTHORISATIONS

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I INTRODUCTION

The age of the regulatory state has brought many changes to the role of the state, the operation of regulatory agencies and has challenged our way of conceptualising the nature of regulation.¹ Regulators who are subject to the multiple goals of efficiency, clarity and predictability, with efficiency taking increasing significance, are focussed on regulating to improve the integrity of market by correcting market failure. A large amount of the regulating is in the form of self-regulation, carried out by private actors in the market including industry bodies with governments and other stakeholders taking a back seat. Many of these self-regulating structures are far from perfect, leading regulators and communities to doubt the ability of corporations to self regulate. These circumstances, that have challenged many regulators, also provide the opportunity to be innovative.

This article has two purposes. The first purpose is to examine the innovative approach of one regulator, the Australian Competition and Consumer Commission ('ACCC'), which has used its discretionary power, of imposing conditions when granting authorisations, to improve industry self-regulation. It has been clearly acknowledged by both the ACCC and the Australian Competition Tribunal, which hears appeals on the ACCC's decisions, that this discretionary power should not be used to construct the ideal or preferred system of self-regulation. However an empirical study of these determinations over the last 10 years demonstrates that ACCC has consistently used conditions for the purpose of enhancing self-regulation primarily by improving the manner in which corporations are monitored. Three specific strategies for improved monitoring are evident namely, enhancing the information provided to stakeholders, improving in-house complaints and dispute resolution processes,

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1 See Clifford Shearing and Jennifer Wood, 'Nodal Governance, Democracy and the New "Denizens"' (2003) 30 *Journal of Law and Society* 400, 402–4; Michael Moran, 'Understanding the Regulatory State' (2002) 32 *British Journal of Political Science* 391.

and mandating external reviews of corporate compliance. It is argued that all these strategies, that challenge traditional views of command and control regulatory strategies, are operating to co-opt others into regulation.

The second purpose of this article is to understand the ACCC's strategies as examples of nodal governance. Nodal governance is defined for the purpose of this article as the establishment of nodes (which possess four specific characteristics namely mentalities, technologies, resources and an institution that is able to mobilise these mentalities, technologies and resources) that are able to interact with other actors in order to govern the systems they inhabit.² This type of governance sees the focus shifting from the state as the centre of governing activity, to other institutions or nodes. These nodes which can be private or public organisations include associations which develop codes of conduct; large corporate groups that may wield sufficient influence to change the behaviour of others in the industry; or a well funded activist group that is able to focus attention and hence modify the conduct of others. This article examines the ACCC's strategies as creating governing nodes. For example by making existing associations responsible for setting up dispute resolution systems, the ACCC is making an existing node responsible for governance. By requiring that these associations involve external auditing processes, the ACCC is creating other nodes to participate in governance by monitoring the conduct of corporate and other organisations.³

This article is divided into four main parts. The first provides the background to the authorisation process, the power to impose conditions and the empirical study that informs this paper. The second discusses the manner in which the Australian competition regulator has been able to co-opt others into regulation by examining three co-opting strategies. The third part analyses this innovative approach as an example of nodal governance, which brings with it many benefits, primarily activating continuous monitoring by stakeholders and promoting corporate reflexivity.⁴ However there are dangers, the most important being the lack of opportunity for weak stakeholders to voice their concerns. The fourth part is a brief conclusion.

2 Scott Burris, Peter Drahos and Clifford Shearing, 'Nodal Governance' (2005) 30 *Australian Journal of Legal Philosophy* 30, 33.

3 *Competition and Consumer Act 2010* (Cth) s 6, repealing *Trade Practices Act 1974* (Cth) s 6, regulates the conduct of corporations as well as organisations that are deemed to be corporations and for the purposes of authorisations includes industry associations, not-for-profit organisations and professional groups. In this article the term corporation is used to describe all the individuals and organisations that may be deemed to be corporations within the Act.

4 Colin Scott, 'Accountability in the Regulatory State' (2000) 27 *Journal of Law and Society* 38; see also Colin Scott, 'Spontaneous Accountability' in Tony Prosser et al, 'Law, Economic Incentives and Public Service Culture' (Working Paper No 05/129, Centre for Market and Public Organisation, University of Bristol, September 2005) <<http://www.bris.ac.uk/cmpo/publications/papers/2005/wp129.pdf>>.

II THE ACCC, THE AUTHORISATION PROCESS AND THE EMPIRICAL STUDY

The ACCC is the Australian competition regulator and the specific area examined here is the authorisation process – which is a process whereby conduct by corporations and organisations that otherwise breaches the competition provisions of the legislation are exempt from prosecution.⁵ The objective of this process is to provide a space for the recognition of public benefit alongside economic efficiency and allow anti-competitive conduct that brings public benefits to continue. Organisations including corporations, industry groups and not-for-profit organisations can apply to the ACCC for authorisation by arguing that the public benefit stemming from anti-competitive conduct could be outweighed by the detriment and should be allowed to proceed.⁶ Examples of public benefit includes improved efficiency, industry cost savings, the enhancement of quality of goods and supplying better information to consumers. The ACCC can grant or deny authorisation and it is also able to grant authorisation subject to conditions.⁷ This power is used when there is uncertainty about whether the authorisation test is met. One example is the *Royal Australasian College of Surgeons* authorisations, where the ACCC, although satisfied as to the significant public benefits generated, was concerned about the potential public detriments.⁸ Here a number of conditions were imposed aimed at ensuring the public benefits were achieved including increasing external involvement in the College's activities and increasing the transparency of the College's processes.⁹

The empirical study undertaken here examined all the authorisation determinations which were granted subject to conditions from 2001 to 2010.¹⁰ The year of the determination, rather than the year of lodgement, was used to collate the determinations. Merger authorisations were not included as it involves a different process and test.¹¹ Multiple authorisation determinations heard together, and involving the same set of facts, were treated as one determination for the purpose of the study.¹² There were 51 such determinations. A new process to decide collective bargaining agreements was introduced into the Act in 2007,

5 The power to grant authorisations is contained in *Competition and Consumer Act 2010* (Cth) s 88, repealing *Trade Practices Act 1974* (Cth) s 88.

6 *Competition and Consumer Act 2010* (Cth) s 90, repealing *Trade Practices Act 1974* (Cth) s 90.

7 *Competition and Consumer Act 2010* (Cth) s 91(3), repealing *Trade Practices Act 1974* (Cth) s 91(3).

8 ACCC, *Royal Australasian College of Surgeons Authorisation*, A90765, 30 June 2003 (ACCC authorisation lodged 28 November 2000).

9 ACCC, *Guide to Authorisation* (2010) 39.

10 During 2001–10, the *Trade Practices Act 1974* (Cth) was in force and is the focus of this article. However the authorisations provisions remain unchanged under the *Competition and Consumer Act 2010* (Cth) which superseded the *Trade Practices Act 1974* (Cth) and the discussion herein would also apply under the current Act.

11 See ACCC, *Merger Guidelines* (November 2008).

12 There were 73 authorisation applications with separate authorisation identification numbers. However they only made up 39 separate determinations, when the multiple determinations, relying on the same facts and where the same determination applied, were treated as a single determination.

which meant that these decisions were not determined in the same manner after 2007.¹³ Accordingly all of the eight collective bargaining determinations before 2007 were removed from this study. Three determinations authorising newsagents to collectively negotiate with publishers and distributors of newspapers and magazines, which dealt with a set of facts unique to the Australian newspaper distribution system, were removed from this study.¹⁴ One authorisation determination involving access to electricity infrastructure which was concerned with specific pricing issues that are quite distinct from other authorisation determinations was also removed from the study.¹⁵ This left a total of 39 determinations to be considered.¹⁶ These determinations were read and the conditions coded to construct the four graphs used in this article.

Prior to continuing with this discussion, it is important to comment briefly on the manner in which this particular regulator has operated historically, which goes towards understanding the strategic way in which it seeks to govern. The ACCC has actively sought to encourage compliance in the market and has used a variety of strategies to do so. It was an early adopter of responsive regulatory strategies concentrating on education and compliance and embarking on litigation in few and considered instances.¹⁷ As discussed by Parker, the ACCC has concentrated on nurturing compliance professionals in the industry,¹⁸ coaxing the courts to go further in ordering companies to rectify the damage done and putting in place systems to prevent it happening again¹⁹ and using the discretionary powers to incorporate compliance procedures into corporate governance. The ACCC has also embraced the notion of co-regulation, defined as a supported form of self-regulation, since the 1980s and has used industry codes as market-sensitive mechanisms for delivering consumer protection

13 After 2007 these applications are contained in ACCC, *Collective Bargaining Notifications Register* (2011) <<http://www.accc.gov.au/content/index.phpml/itemId/773840>>.

14 ACCC, *Australian Newsagents Federation Ltd – Authorisation*, A91134, 16 July 2009 (ACCC authorisation lodged 17 April 2009); ACCC, *Australian Newsagents Federation Ltd – Authorisation*, A91174, 2 September 2009 (ACCC authorisation lodged 28 July 2009); ACCC, *Queensland Newsagents Federation Ltd – Authorisation*, A91117, 22 April 2009 (ACCC authorisation lodged 22 December 2008).

15 ACCC, *National Electricity Code – Prudential Framework – Settlement Residue Auctions Amendments*, A90877, A90878 and A90879, 21 January 2004 (ACCC authorisations lodged 14 August 2003).

16 Of the 39 authorisations, 14 were single authorisations and the remainder were multiple determinations. Four of the 39 dealt with four authorisations applications (total of 16 applications dealing with the same facts) and where the decision was delivered as four determinations. Five dealt with three authorisation applications (total of 15 applications dealing with the same facts) and where the decision was delivered as six determinations. Fourteen dealt with two authorisation applications (total of 28 applications dealing with the same facts) and delivered as 14 determinations.

17 Ron Bannerman, 'Points from Experience 1967–84' in Trade Practices Commission, Commonwealth of Australia, *Annual Report 1983–84* (1984) 157, 191; see also Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) which has an enormous impact on the regulation of competition and consumer protection in Australia.

18 Christine Parker, 'Compliance Professionalism and Regulatory Community: The Australian Trade Practices Regime' (1999) 26 *Journal of Law and Society* 215, 227. See also Christine Parker, 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings' (2004) 67 *The Modern Law Review* 209.

19 Parker, 'Compliance Professionalism', above n 18, 221.

rules.²⁰ It has published guidelines for the development of such codes²¹ and has stated that it is appropriate for self-regulatory codes to replicate or exceed legislative requirements if they encourage better practice and behaviour from industry members.²² A review of business' opinions of the ACCC reported that businesses saw the ACCC most positively in relation to its strategic sophistication and viewed the ACCC as an effective regulator, whose activities were beneficial to the Australian economy.²³ It is important to note that the co-opting strategies discussed below are within the context of a regulator that has historically been reasonably innovative and strategic.

III THREE STRATEGIES FOR CO-OPTING OTHERS INTO THE REGULATORY GAME

Section 91(3) of the *Trade Practices Act 1974* (Cth) states, '[a]n authorisation may be expressed to be subject to such conditions as are specified in the authorisation'.²⁴ The primary objective of conditions is to address anti-competitive detriment or to increase the likelihood of the public benefit claimed.²⁵ This remains the purpose for which the power under section 91(3) was granted. In the *Application by Medicines Australia Inc* appeal, the Australian Competition Tribunal stated that the purpose of the condition is to increase the likelihood that the public benefit claimed for the Code is realised in respect of the provisions dealing with the conferral of such benefits to doctors.²⁶ However the Tribunal warned that whereas conditions could be designed to enhance the benefits from a voluntary Code, it cannot go as far as redrafting the Code and stated that 'it is not for the ACCC or the Tribunal to use the conditioning power and its discretion in order to construct and impose its ideal or preferred system of self-regulation'.²⁷

20 ACCC, Submission No 181 to Treasury, *Financial System Inquiry*, September 1996. See also Graeme Samuel, 'Industry Regulation – Can Voluntary Self-Regulation Ever Be Effective?' (Speech delivered at the Centre for Corporate Public Affairs 2003 Oration, Melbourne, 20 November 2003) 5–6.

21 See ACCC, *Guidelines for Developing Effective Voluntary Industry Codes of Conduct* (2005); Australian Law Reform Commission ('ALRC'), *Compliance with the Trade Practices Act 1974*, ALRC Report No 68 (1994) [3.7]. See also the introduction of Part IVB of the *Trade Practices Act 1974* (Cth) in *Trade Practices Amendment (Fair Trading) Act 1998* (Cth).

22 ACCC, *Australian Direct Marketing Association – Revocation and Substitution*, A90876, 29 June 2006 (ACCC authorisation lodged 25 July 2003) 17–8.

23 Christine Parker and Vibeke Nielsen, 'Do Businesses Take Compliance Seriously?' (Research Paper No 197, University of Melbourne Legal Studies, 2006) 160. However it should be noted that the authors report that businesses were critical of the ACCC's use of the media.

24 *Competition and Consumer Act 2010* (Cth) s 91(3) mirrors this provision.

25 See ACCC, *Medicines Australia*, A90779 and A90780, 14 November 2003 (ACCC authorisations lodged 16 January 2003).

26 *Application by Medicines Australia Inc* [2007] ACompT 4 (27 June 2007) 7 (French J, GF Latta and Prof Walsh).

27 *Ibid* 31.

However as the empirical study that informs this article establishes, conditions at times appear to fulfil other collateral objectives, such as setting up procedures for the supply of relevant information to stakeholders including consumers, competitors and the ACCC; incorporating independent and accessible dispute resolution panels; and mandating the external oversight of business practices including requiring the company to act upon the overseer's recommendations. These types of conditions do more than address anti-competitive conduct. They are steps in managing markets, market conduct, and the actions of individual market actors by allowing a wide group of stakeholders and auditors to access information and processes aimed at calling corporations to account. It is clear that such conditions co-opt others to regulate corporations and engage with the regulatory process. It is usual for these conditions to originate with the ACCC after consultation with shareholders and after consideration of the submissions made in response to the application for authorisation. However in many instances applicants, competitors and other stakeholders have made recommendations on the design of the conditions, which may or may not be taken up by the ACCC.²⁸

The conditions are divided into three main categories or collateral purposes, namely information provision, processes for complaints and disputes and external oversight. These categories can also be seen as different types of monitoring strategies, which are directed at specific stakeholders. It is usual for these strategies to stand alone and a simple example is where a company is required to disclose relevant information to users by letting them know that comparable services can be obtained elsewhere.²⁹ At other times the conditions may require a variety of strategies to be employed. For example an authorisation may be granted on the basis that an external consultant be appointed to assess the manner in which the corporations to the authorisation comply with the law (external oversight) and that the corporations act upon the consultant's recommendations. This may require the consultants' report being made available to the regulator and members in the industry (information provision). It may also require the corporation to introduce new processes such as requiring the consultant to report breaches of the law to the industry dispute resolution panel (processes for complaints and disputes).

An example of an authorisation where conditions involving a variety of categories were imposed is the *Medicines Australia* authorisation, where the Australian Pharmaceutical Manufacturers Association sought authorisation of a code of conduct seeking to regulate the promotion of prescribed medicines by pharmaceutical companies, which was likely to breach the anti-competitive

28 See, eg, ACCC, *Virgin Blue Airlines Pty Ltd & Ors – Authorisations*, A91227 and A91228, 16 December 2010 (ACCC authorisations lodged 6 May 2010) 98, where the applicant proposed conditions which were similar, though not identical, to those imposed by the ACCC.

29 ACCC, *Agsafe Limited – Minor Variation to Authorisations*, A90680 and A90681, 19 April 2006 (ACCC authorisations lodged 28 October 2005); ACCC, *Agsafe Limited – Authorisation*, A91234, A91242, A91243 and A91244, 27 October 2010 (ACCC authorisations lodged 28 May 2010).

agreements provision of the Act.³⁰ This Code required the provision of information about prescribed medicines to health care professionals and the public by pharmaceutical companies as well as the regulation of the provision of financial and other benefits to health care professionals by pharmaceutical companies. The ACCC expressed concerns about how effectively the enforcement procedures by the Association of the Code were implemented, stating that only seven relevant complaints over the past three years by stakeholders had been received which was a very low number.³¹ The ACCC imposed a number of conditions including requiring member companies to provide information on all educational symposia and meetings held by the company; the details of any hospitality or entertainment offered; the number, description and professional status of attendees; as well as a copy of the material provided to attendees. This information was to be provided to the Association's Monitoring Committee which would consider it to compile a report. The details of this report, including the concerns raised and the manner, in which their concerns were dealt with, had to be published on the *Medicines* website and in the Medicines Association Annual Report.³² The Monitoring Committee were required to make complaints to the Conduct Committee in certain circumstances.³³ The inclusion of the Monitoring Committee as a body that could make complaints under the Code clearly altered the dispute resolution processes that were in place. The Australian Competition Tribunal upheld the imposition of these conditions and stated that it was designed to enhance compliance and enforcement of the Code. The conditions were consistent with the statute and the objects of enhancing the welfare of Australians through the promotion of competition, fair trading and consumer protection provisions within the legislation.³⁴ By upholding the ACCC's conditions, while noting that the conditions power is not intended to create an ideal self regulation system, the Tribunal is approving the exercise of power in this case. However as the empirical study of 39 determinations from 2001 to 2010 demonstrates, the conditions power has been used to fulfil the three collateral purposes all of which add up to improving industry self regulation. These three categories are discussed below.

A Information Provision

Information, clearly considered the key to decision-making by consumers, competitors and regulators, is not always easily available in a market economy

30 *Competition and Consumer Act 2010* (Cth) s 45, repealing *Trade Practices Act 1974* (Cth) s 45.

31 ACCC, *Medicines Australia*, A90779 and A90780, 14 November 2003 (ACCC authorisations lodged 16 January 2003) 37 [5.59]. See also ACCC, *Medicines Australia Inc – Authorisations*, A90994, A90995 and A90996, 26 July 2006 (ACCC authorisations lodged 30 November 2005).

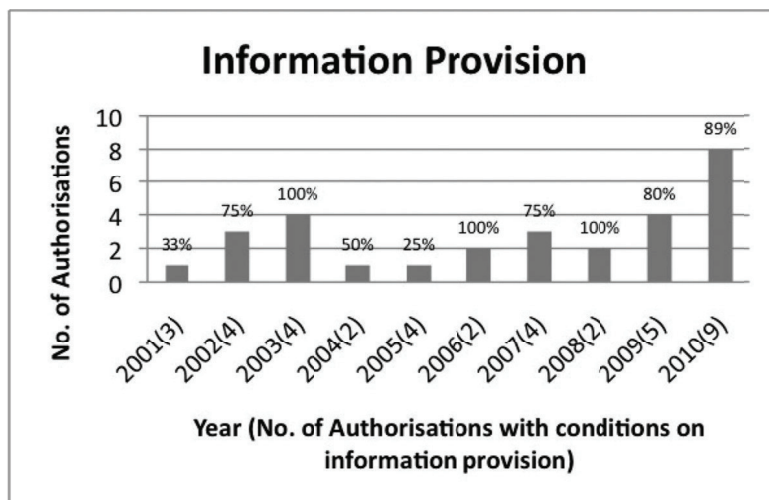
32 ACCC, *Medicines Australia*, A90779 and A90780, 14 November 2003 (ACCC authorisations lodged 16 January 2003) 40 [5.80].

33 *Ibid* 40–1.

34 *Re Medicines Australia Inc* [2007] ACompT 4 (27 June 2007) [360], [362] (French J, GF Latta and C Walsh).

and many of the conditions are aimed at rectifying this market failure by funnelling relevant information to appropriate audiences. Figure 1 below details the number of authorisations, where conditions dealing with information provision, were made and the number in brackets indicates the total number of determinations with conditions made in that year.

Figure 1: Conditions dealing with information provisions in ACCC authorisation determinations 2001–10



As illustrated in Figure 1, the ACCC has used conditions to ask for the provision of information in every one of the 10 years studied, with it being required in all four out of four determinations in 2003 and in eight out of the nine determinations made in 2010. The cases show that the information flow is directed at different parties. Where the corporations are operating in a competitive market, competitors would be keen on monitoring each others' behaviour and relevant information could be made accessible to industry participants and may be best distributed through the industry association. Where it is the consumers or acquirers of goods and services that are seeking the information, it may be best to distribute relevant information in an accessible form through the company's website. Where the market clearly does not have many competitors or where the sector of the market that is considered in the authorisation decision is not a competitive sector, it may be the regulator or an independent auditor that is best placed to consider such information and decide what to do with it. All these tools have been used at different times in the authorisation determinations studied.

Competitors and consumers are often seeking information about participants in the market to decide how to price a good, when to buy a good and how to design marketing strategies. Competitors are also seeking information in an effort to regulate each other. For example, having information about the incentives

offered to pharmacists to sell drugs by pharmaceutical companies may allow consumers to move away from a particular corporation or to make a complaint to the regulator about the lack of choice in a market. It may allow competitors to use the courts to take action against the company if there is anti-competitive conduct or to harness the media to make such information more widely distributed. Such an issue was dealt with in the *Generic Medicines Industry Association* authorisation where the condition required the Association to publish information on the non-price benefits provided by members to pharmacists and the format in which it should be provided, on the Association's website.³⁵ By incorporating this condition the ACCC was responding to the concerns that non-price incentives including the offer of loyalty programs undermined the confidence in the generic medicines industry. The rationale for the condition was expressed as 'making public the nature and size of such benefits imposes its own constraint and the companies conferring such benefits are likely to ensure they are in a position to publically explain them'.³⁶

Consumers and users of services require information to make decisions and sometimes the necessary information is difficult to procure. In the *Australasian College of Cosmetic Surgery* authorisation the condition imposed by the ACCC required the College of Cosmetic Surgery to provide a brochure to all persons at their first consultation or where the first consultation is by telephone, video, mail or email, particularly given the increasing demand for telemedicine, prior to this first consultation.³⁷ The existing Code only required for such a brochure to be given before a procedure was agreed to. Further the conditions mandated that the practitioner was required to provide a written summary of their own training and experience at the first consultation. The existing Code only required members to have such information available for distribution.³⁸ In the *Royal College of Surgeons* authorisation, relevant information had to be made publicly available and included the number of surgical trainees in each year, a description of the exam and the marking system used as well as the pass rate for these examinations. It was stated in this determination that the conditions imposed were aimed at providing a greater role for governments in standard setting, emphasising the public interest issues raised as well as the manner in which governments participate in regulation.³⁹ In the *Agsafe* authorisation the condition imposed required information on the industry association website to be corrected in order to clearly indicate that it would be possible to procure accreditation through alternative sources.⁴⁰

35 ACCC, *Generic Medicines Industry Association Pty Ltd – Authorisations*, A91218 and A91219, 3 November 2010 (ACCC authorisations lodged 31 March 2010) 51 [5.161].

36 Ibid iv.

37 ACCC, *Australasian College of Cosmetic Surgery – Authorisation*, A91106, 18 June 2009 (ACCC authorisation lodged 6 November 2008) 31 [6.95].

38 Ibid 30 [6.89].

39 ACCC, *Royal Australasian College of Surgeons Authorisation*, A90765, 30 June 2003 (ACCC authorisation lodged 28 November 2000) 4 [1.28].

40 ACCC, *Agsafe Limited Authorisation*, A91234, A91242, A91243 and A91244, 27 October 2010 (ACCC authorisations lodged 28 May 2010) 30 [3.80].

In other cases, where there is little incentive to monitor a company's conduct, the regulator may have little choice but to step in and do so. In cases such as the *Australian Pensioners League of Western Australia* authorisation, the authorisation dealt with an agreement whereby funeral directors in the State agreed to provide the member of the Pensioners League with a fixed price funeral which was a discount of 60 per cent off the full price of a basic funeral. The ACCC noted that this agreement affected only around five per cent of the lower priced end of the relevant market and was unlikely to be of any interest to the competitors in the industry. However it was capable of breaching the Act and authorisation was sought and granted subject to conditions. The condition imposed here required the Pensioners League to provide details of contracts entered into with the funeral directors to the ACCC when requested.⁴¹ In other cases, even where there may be active monitoring of the corporation, the ACCC may want to be kept up to date on matters that have significant public interest issues or that is likely to have an adverse impact on the market. For example, in *Medicines Australia* the corporation had to keep the ACCC informed annually on amendments to the industry Code.⁴²

Although the ACCC has not required corporations to report to it in all the determinations, this has been required in 17 out of the 39 determinations studied. The kind of reporting that the regulator has sought has varied. It has included reporting on the manner in which the authorisation is being given effect;⁴³ providing the ACCC with a consolidated account of the information provided to stakeholders, for example on the number of complaints made;⁴⁴ giving the ACCC a summary of any audits conducted by the corporation that addresses issues in

41 ACCC, *Australian Pensioners League of Western Australia – Authorisation*, A70012, 24 October 2001 (ACCC authorisation lodged 10 January 2001).

42 ACCC, *Medicines Australia* authorisation, A90779 and A90780, 14 November 2003 (ACCC authorisations lodged 16 January 2003) 46. See also ACCC, *International Air Transport Association – Authorisation*, A91083, 29 August 2008 (ACCC authorisation lodged 7 March 2008); ACCC, *CALMS Ltd – Authorisation*, A91092, 15 October 2008 (ACCC authorisation lodged 30 June 2008).

43 Determinations falling into this category included ACCC, *Australian Pensioners League of Western Australia – Authorisation*, A70012, 24 October 2001 (ACCC authorisation lodged 10 January 2001); ACCC, *Royal Australian College of General Practitioners – Authorisation*, A90795, 19 December 2002 (ACCC authorisation lodged 31 August 2001); ACCC, *International Air Transport Association – Authorisation*, A91083, 29 August 2008 (ACCC authorisation lodged 7 March 2008); ACCC, *CALMS Ltd – Authorisation*, A91092, 15 October 2008 (ACCC authorisation lodged 30 June 2008); ACCC, *Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland – Authorisation*, A91103, 26 March 2009 (ACCC authorisation lodged 6 October 2008); ACCC, *Casurina Business Precinct Stakeholders Committee – Authorisation*, A91201, 12 May 2010 (ACCC authorisation lodged 11 December 2009); ACCC, *Casurina Business Precinct Stakeholders Committee – Authorisation*, A91202, 12 May 2010 (ACCC authorisation lodged 30 November 2009).

44 See, eg, ACCC, *Australian Performing Rights Association Ltd ('APRA') – Revocation and Substitution*, A91187–A91194 and A91211, 16 April 2010 (ACCC authorisations lodged 30 September 2009); ACCC, *Virgin Blue Airlines Pty Ltd & Ors – Authorisations*, A91227 and A91228, 16 December 2010 (ACCC authorisations lodged 6 May 2010).

the authorisation;⁴⁵ and finally information on the manner in which the corporation may have responded to the complaints or the audit.⁴⁶

The ACCC has also been using conditions to direct the company to develop standards and guidelines on the type of information that has to be made public. In the *Phonographic Performance Company* authorisation, the ACCC required the Phonographic Performance Company of Australia to develop guidelines which outline the circumstances in which the licensor would consider entering into direct licences for public performance and transmission rights in sound recordings with users and potential users of these rights.⁴⁷ These guidelines are clearly directed at prescribing information content for decision making. There is also scope to involve stakeholders in determining the kind of information that has to be provided. Whereas in the *Royal College of Surgeons* the ACCC saw the scope for governments to be involved in developing standards for the profession,⁴⁸ in the *Medicines Australia* authorisation the ACCC considered that there was already an adequate level of consumer representation on the committee of that corporation.⁴⁹

The information gathering process has been used to check on the rate and quality of compliance. In the *Generic Medicines Industry Association* authorisation discussed above, the ACCC stated that it would seek further information from the Association on adherence to the Code and whether the Association had been effective in encouraging compliance.⁵⁰ In *Phonographic Performance Company*, the ACCC required the Phonographic Performance Company of Australia to monitor compliance with the guidelines it had developed, and to report to the ACCC the manner in which licensors complied with the guidelines.⁵¹ The ACCC is steering companies to enforce the law, sometimes with the help of independent consultants (as discussed later as external oversight) and staying informed about the process through the

45 See, eg, ACCC, *APRA – Revocation and Substitution*, A91187–A91194 and A91211, 16 April 2010 (ACCC authorisations lodged 30 September 2009); ACCC, *The North West Shelf Project – Authorisations*, A91220, A91221, A91222 and A91223, 8 September 2010 (ACCC authorisations lodged 31 March 2010); ACCC, *Australasian College of Cosmetic Surgery – Authorisation*, A91106, 18 June 2009 (ACCC authorisation lodged 6 November 2008).

46 ACCC, *Construction Material Producers Association Inc – Authorisation*, A91047, 29 August 2007 (ACCC authorisation lodged 5 April 2007).

47 ACCC, *Phonographic Performance Company of Australia Ltd – Revocation and Substitution*, A91041 and A91042, 27 September 2007 (ACCC authorisations lodged 3 April 2007) 54.

48 ACCC, *Royal Australasian College of Surgeons Authorisation*, A90765, 30 June 2003 (ACCC authorisation lodged 28 November 2000).

49 ACCC, *Medicines Australia – Authorisation*, A90779 and A90780, 14 November 2003 (ACCC authorisations lodged 16 January 2003).

50 ACCC, *Generic Medicines Industry Associations Pty Ltd – Authorisations* (2010) A91218 and A91219, 3 November 2010 (ACCC authorisations lodged 31 March 2010) iv.

51 ACCC, *Phonographic Performance Company of Australia Ltd – Revocation and Substitution*, A91041 and A91042, 27 September 2007 (ACCC authorisations lodged 3 April 2007) 54–5.

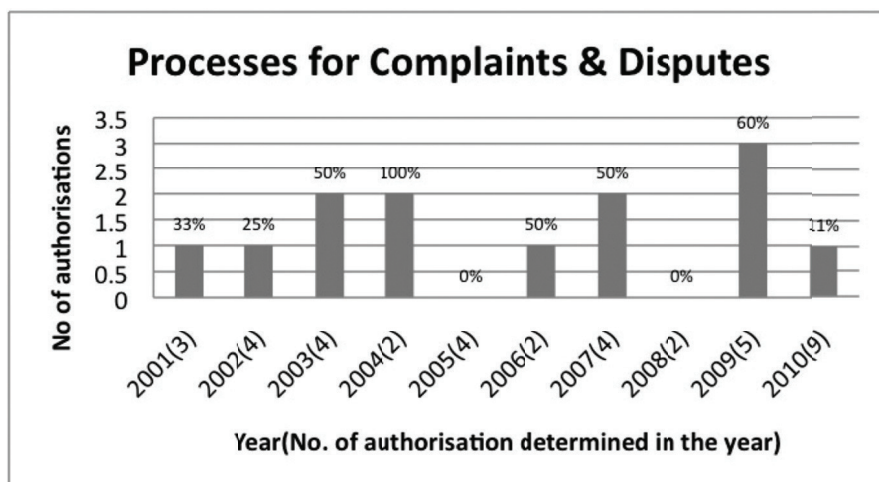
discretionary power granted under section 91(3). The threat that non-compliance may lead to litigation is always clearly present in the grant of authorisation.⁵²

B Processes for Complaints and Disputes

With the increase in privatisation during the 1990s, there has been a greater reliance on self-regulation and professional associations have been playing an increasingly important role in regulation. The authorisation determinations studied illustrate that the ACCC has been facilitating self-regulation by closely examining the governance mechanisms within the codes of conduct of professional associations and the practices of industry bodies and by requiring certain safeguards to be incorporated. Of the 39 determinations studied, 13 dealt with codes of conduct, nine dealt with agreements between members of associations and 12 dealt with agreements within a sector of the industry. Only five concerned agreements between large corporations, for example joint venture contracts between corporations. It is noteworthy that nearly 90 per cent of the authorisations, where conditions were imposed, dealt with the regulation of an industry group, be it an association or industry sector. In many of these cases the ACCC incorporated complaints process and dispute resolution systems into the by-laws and constitutions of the associations. Such processes are useful not only for members of the association who seek to air their grievances about the conduct of the association or members within the association, but also for consumers who may want to complain about the service that is being provided. Such processes could be accessed by an even wider group such as consumer interest groups or public interest groups that may wish to monitor the manner in which the body may be regulating itself or may seek to make a complaint about a member of the association or industry group.

52 See, eg, ACCC, *State of Queensland Acting through the Office of Liquor and Gaming Regulation – Authorisation*, A91224, 7 October 2010 (ACCC authorisation lodged 15 April 2010); ACCC, *State of Queensland Acting through the Office of Liquor and Gaming Regulation – Authorisation*, A91225, 7 October 2010 (ACCC authorisation lodged 23 April 2010).

Figure 2: Conditions dealing with processes for complaints and disputes in ACCC authorisation determinations



By ensuring such mechanisms are in place, the ACCC is reducing the possibility of misuse of market power and in the *Phonographic Performance Company*, it stated that the alternative dispute resolution processes, in addition to the dispute resolution process available upon application to the Copyright Tribunal, would be an additional check on the company's market power.⁵³ However by doing so it is also facilitating the decentralisation of regulation and providing processes for others to be involved in monitoring and regulating the corporation or association. Parker has pointed out that the ACCC has probably contributed to the diffusion of complaints handling systems through its involvement with other organisations.⁵⁴ As evident in Figure 2 above, the ACCC has incorporated complaints and dispute resolution process via conditions in 13 out of the 39 authorisation determinations studied, including in three out of the five determinations in 2009. However, in 2005 and 2008 there were no conditions related to this issue.

One clear cut example is the *APRA* authorisation, where authorisation was granted on the basis of a number of conditions, one of which required APRA to set up a new dispute resolution mechanism to handle complaints between it and its users.⁵⁵ The conditions required disputes be heard before a panel of three

53 ACCC, *Phonographic Performance of Australia Ltd – Revocation and Substitution*, A91041 and A91042, 27 September 2007 (ACCC authorisations lodged 3 April 2007) 35 [6.83].

54 Parker, above n 18.

55 ACCC, *Australian Performing Rights Association Ltd* (1998) A30186–A30193. These conditions were first introduced in 1998 and not part of the empirical study. However similar conditions were incorporated in 2010. See ACCC, *APRA – Revocation and Substitution*, A91187–A91194 and A91211, 16 April 2010 (ACCC authorisations lodged 30 September 2009).

adjudicators to determine the dispute and also required APRA to bear the cost of the dispute resolution process. APRA contested this on the basis of the cost involved and proposed another model that saw APRA paying the cost of the mediator in the dispute resolution process, but proposing that the remaining administrative costs, such as the costs of the stenographers and room hire, should be shared between the parties. The Australian Competition Tribunal in its decision found a middle ground and commented that such a process was an essential avenue for dissatisfied members to air their grievances against APRA, which retained a monopoly position in the market. The decision recognised that adequate dispute resolution mechanisms may be one way of monitoring the activities of monopolies. In 2010 authorisation on much the same conditions was granted.⁵⁶

At times these dispute resolution processes are in addition to those once available under the law. However they offer cheaper, quicker and less formal alternatives with more flexible remedies. In the *Australian Amalgamated Terminals Pty Ltd* authorisation the ACCC required the incorporation of a dispute resolution process, with provision for mediation and, ultimately, expert determination which can be accessed by end-users of AAT's terminals.⁵⁷ This process was in addition to the dispute resolution process that may be available to the parties to the contract, as well as those available to port authorities' dispute resolution processes and were not intended to compromise the operation of these existing processes.⁵⁸ Likewise in the *Victorian Egg Industry Cooperative* authorisation, the conditions provided an independent appeal mechanism for producers in addition to the procedures provided under the *Commercial Arbitration Act 1984* (Vic).⁵⁹

At other times the ACCC may be using the conditions power to introduce standard form dispute resolution processes. In *Allianz Australia Insurance Ltd* the ACCC granted authorisation to three large insurance companies to set up a single co-insurance pool specifically for the provision of public liability insurance to not-for-profit organisations, which would otherwise contravene the anti-competitive provisions of the Act. The conditions included complaints handling procedure consistent with the Australian standards, as well as a requirement that all complaints and their outcomes are reported to the ACCC on a quarterly basis.⁶⁰ In the *Australian Payments Clearing Association* authorisation, similar conditions were required for fair treatment of both

56 ACCC, *APRA – Revocation and Substitution*, A91187–A91194 and A91211, 16 April 2010 (ACCC authorisations lodged 30 September 2009).

57 ACCC, *Australian Amalgamated Terminals Pty Ltd – Authorisations*, A91141, A91142, A91181 and A91182, 3 December 2009 (ACCC authorisations lodged 5 August 2009).

58 ACCC, *Australian Amalgamated Terminals Pty Ltd – Authorisations*, A91141, A91142, A91181 and A91182, 3 December 2009 (ACCC authorisations lodged 5 August 2009) 36–7.

59 ACCC, *The Victorian Egg Industry Co-operative* (1995) A40072 29. This authorisation determination is not part of the empirical study.

60 ACCC, *Allianz Australia Insurance Ltd, QBE Insurance (Australia) Ltd, NRMA Insurance Ltd – Authorisation*, A30217 and A30218, 24 March 2004 (ACCC authorisations lodged 22 October 2002) 55 [6.86].

members and non-members of the Association, as well as providing equal access to facilities.⁶¹

The mere presence of a complaints or dispute resolution system within a code of conduct may not be enough to ensure that it is effective. Other important factors include that these systems be independent; the decision making be transparent and complaints and dispute resolution panels be accountable; there be appeal processes available; and access to these systems be available at reasonable cost. All these factors have been explored by the ACCC in its determinations and a number of the conditions are designed with these factors in mind. The independence and accountability of the members on the complaints and dispute resolution panels or committees was addressed in *Real Estate Institute of Australia Limited* where the ACCC was asked to authorise a code of conduct. The ACCC agreed to the authorisation only if adequate provision was made for consumer access to the complaint handling mechanism and for appeals to be made to an independent arbitrator and stated:

The establishment of a complaint handling mechanism that provides for an avenue of appeal to an independent arbitrator and the making of decisions in accordance with the principles of procedural fairness as well as public reporting is important, therefore, not only to ensure that the Code is likely to result in a benefit to the public but also to act as a check against any attempt to use the complaint handling procedures in an anticompetitive manner.⁶²

Similarly in the *Australian College of Cosmetic Surgery* Authorisation the ACCC included a condition into the College's Code requiring that the member of the External Appeals Committee not be a member of the college.⁶³ In the *Royal Surgeons* authorisation, the conditions imposed required that a number of the members of the Appeals Committee had to be nominated by the Australian Health Ministers reflecting the public interest issues involved in the determination.⁶⁴ Again in the *Agsafe* determination, the Commission asked for the Code to be varied to ensure 'independence and allow for natural justice and procedural fairness'.⁶⁵ Increasing transparency of decision-making has also been addressed by conditions and in the *Medicines* authorisation, the information was

61 ACCC, *Allianz Australia Insurance Ltd, QBE Insurance (Australia) Ltd, NRMA Insurance Ltd – Authorisation*, 24 March 2004, A30217 and A30218, 24 March 2004 (ACCC authorisations lodged 22 October 2002) 55 [6.86]. See also ACCC, *Australian Payments Clearing Association (APCA) – Minor Variation* (2004) A30176, A30177 and A90620, 16 August 2000 (ACCC authorisation lodged 1 December 2000) 24; ACCC, *Australian Direct Marketing – Revocation and Substitution*, A90876, 29 June 2006 (ACCC authorisation lodged 25 July 2003).

62 *Real Estate Institute of Australia Limited* (2000) ATPR (Com) 50-279, 53 453.

63 ACCC, *Australasian College of Cosmetic Surgery – Authorisation*, A91106, 18 June 2009 (ACCC authorisation lodged 6 November 2008) 56.

64 ACCC, *Royal Australasian College of Surgeons – Authorisation*, A90765, 30 June 2003 (ACCC authorisation lodged 28 November 2000) 217.

65 ACCC, *Agsafe Limited – Authorisation*, A90680 and A90681, 3 October 2002 (ACCC authorisations lodged 21 August 2002); ACCC, *Agsafe Limited – Authorisation*, A91234, A91242, A91243 and A91244, 27 October 2010 (ACCC authorisations lodged 28 May 2010); see also ACCC, *Australian Hotels Association (NSW) Application for Authorisation*, A90837, 23 May 2003 (ACCC authorisation lodged 17 July 2002), where the applicants agreed to develop a dispute resolution mechanism as a condition of the authorisation being granted.

required to be posted on the Association's website and in *Re Surgeons* the College was required to publish annually a range of information about its selection processes, training and examination processes for qualification as surgeons.⁶⁶

The importance of an appeals process and the costs of doing so have also been explored in the determinations. In the *Australian Institute of Mining and Metallurgy authorisation* determination where the ACCC stated that 'the introduction of an appeals process for applicants denied admission to the Institute and the enhancement of procedural fairness through the introduction of a requirement for the Board to give reasons for its decisions'.⁶⁷ While the first of these two issues was dealt with by the Institute following the draft determination, the second was dealt with by the ACCC through the imposition of a condition to the grant of the authorisation. The ACCC expressed concern about members being represented by a duly qualified legal practitioner and made the authorisation also subject to such a consideration. In the *Sydney Futures Exchange Clearing Corporation* authorisation, the condition addressed the cost of appealing a decision of a self regulated body, in this case the Board of the Clearing Corporation, which makes the decision in accordance with its by-Laws on allowing applicants to become members of this clearing corporation. These by-Laws provide for an appeal from the Board's decision to be made to an independent Appeal Tribunal and stated that the Board may prescribe the fee payable. The condition required this By-Law to be amended so that each party would bear their individual costs of appeal and that the costs of appointing the Appeal Tribunal would be shared and the maximum contribution of by the applicant would be capped at \$10 000.⁶⁸

However, the incorporation of well designed dispute resolution processes may still require regular review and at times the ACCC has been able to use conditions to ensure that the associations or corporations report on the way the processes are operating to stakeholders. In the *Cosmetic* Authorisation, the ACCC asked for every complaint received by the College, as well as any past complaints about the same member, the outcome of every complaint including details of the sanctions imposed, whether there is an appeal of the decision and if the complaint is dismissed, the reasons for such dismissal to be reported.⁶⁹ In other instances the ACCC has required that the reports be made to it as illustrated

66 ACCC, *Medicines Australia*, A90779 and A90780, 14 November 2003 (ACCC authorisations lodged 16 January 2003). See also ACCC, *Royal Australasian College of Surgeons Authorisation*, A90765, 30 June 2003 (ACCC authorisation lodged 28 November 2000) 177–80.

67 ACCC, *Australian Institute of Mining and Metallurgy Revocation and Substitution*, A90824, 16 December 2004 (ACCC authorisation lodged 11 May 1999) 20.

68 ACCC, *Re Australian Stock Exchange* (1998) A90623, i–ii. See also ACCC, *Royal Australasian College of Surgeons Authorisation*, A90765, 30 June 2003 (ACCC authorisation lodged 28 November 2000) which required that the Appeal Committee be comprised of a majority of members, including the Chairman, be nominated by the Australian Health Minister, and only a minority of members be Fellows of the College of Surgeons.

69 ACCC, *Australasian College of Cosmetic Surgery – Authorisation*, A91106, 18 June 2009 (ACCC authorisation lodged 6 November 2008) 40 [6.170].

in the *APRA Authorisation* where the condition related to dispute resolution and required the Association to submit a written report of the findings and information on all disputes and the manner in which they were resolved.⁷⁰

C External Oversight

The third collateral purpose of the conditions power is to provide for external monitoring of the parties to the authorisation. Enforcement in the form of monitoring a company's breaches of the law as well as compliance with the law is essential to any regulatory system. Although such enforcement is usually carried out by the regulator particularly in areas of corporate law breaches, or in the courts as a consequence of litigation, it is possible to outsource this task as illustrated by this study. There are many advantages of doing so: it moves the regulator away from an adversarial role of accessing internal corporate information which can be both complex and costly; it places responsibility on the corporation to reflect on its internal processes and consider ways of improvement; it may also strategically encourage a compliance mentality among corporations thereby improving market governance.

The main disadvantage of outsourcing this task is clearly that of capture – the independent monitor may be subject to industry capture. Involving independent, non-industry members can provide a check from industry capture and it is common in the authorisations involving large corporations⁷¹ to have consumer representatives or members of the public represented on decision-making committees.⁷² In certain cases the merits of having gender diversity as well as the need for members of the government to be involved in these processes has been noted.⁷³

Figure 3 below gives the broad picture of the manner in which the ACCC has used conditions to mandate external oversight and compares it to the two categories discussed above. It illustrates that this form of review was most used in 2009 and 2010 where four determinations involved conditions requiring such review. Closer analysis of the determinations shows that the conditions incorporate different forms of external oversight: changing the composition of decision-making committees within the corporation to include parties outside the corporation thereby increasing external oversight; mandating independent review

70 ACCC, *APRA Limited – Revocation and Substitution*, A91187–A91194 and A91211, 16 April 2010 (ACCC authorisation lodged 30 September 2009) 69. See also ACCC, *Australian Direct Marketing – Revocation and Substitution*, A90876, 29 June 2006 (ACCC authorisation lodged 25 July 2003) where the ACCC has used the conditions power to conduct regular internal reviews of these processes and codes of conduct generally.

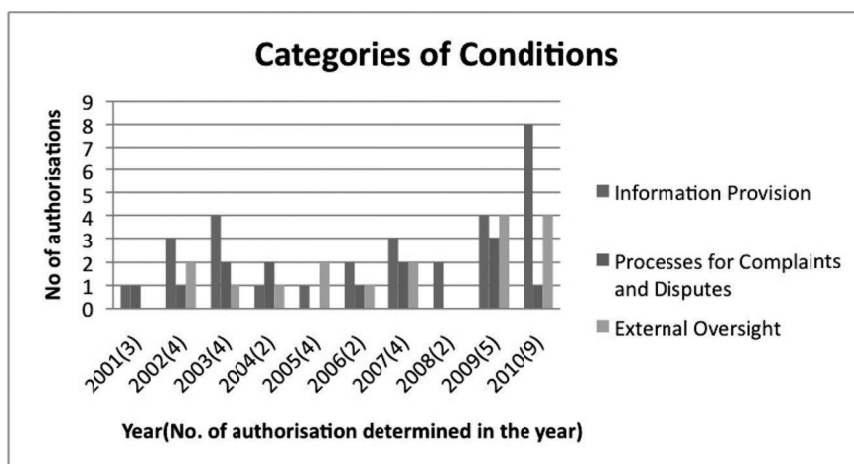
71 See, eg, ACCC, *APRA Limited – Revocation and Substitution* A91187–A91194 and A91211, 16 April 2010 (ACCC authorisation lodged 30 September 2009).

72 See, eg, ACCC, *APRA Limited – Revocation and Substitution* A91187–A91194 and A91211, 16 April 2010; ACCC, *Medicines Australia*, A90779 and A90780, 14 November 2003 (ACCC authorisations lodged 16 January 2003) and ACCC, *Generic Medicines Industry Association Pty Ltd – Authorisations*, A91218 and A91219, 3 November 2010 (ACCC authorisations lodged 31 March 2010).

73 ACCC, *Royal Australasian College of Surgeons Authorisation*, A90765, 30 June 2003 (ACCC authorisation lodged 28 November 2000) 199, 201.

and reporting on processes internal to the corporation; and lastly requiring the corporation to consider and implement the recommendations of the independent review. Often the ACCC requires that it be informed of the outcome of the reviews. It is clear that each of these types of review is aimed at encouraging the participation of wider stakeholders while at the same time accompanied by a less direct involvement by the regulator. The regulator is choosing to regulate indirectly by co-opting others in regulation. Each of these three forms of external oversight is discussed below.

Figure 3: Conditions dealing with three categories in ACCC authorisation determinations



Altering the composition of committees by involving external stakeholders can bring about a cultural shift in decision-making, which was what was clearly articulated in an early decision of *FACTS* authorisation where the ACCC noted that the likelihood of achieving effective self-regulation by industry organisations is improved ‘where consumer or consumer groups are drawn into the consultation process so that not only is the result better-tailored but there is less risk of resentment’.⁷⁴ In this authorisation the ACCC imposed a condition requiring annual consultations with consumer organisations and other relevant health and safety authorities in order to decide whether to extend or revise the guidelines.⁷⁵ In the *Medicines* authorisation the ACCC noted that the members of the Monitoring Committee Members included industry, professional and consumer representatives, which added a level of independence to its decision-making.

Conditions have directed the corporation to conduct an independent review in 12 out of the 17 determinations dealing with external oversight. In the *Surgeons*

⁷⁴ ACCC, *Federation of Australian Commercial Television Stations* (1984) ATPR 50-075.

⁷⁵ *Ibid.*

authorisation the ACCC was concerned with the exclusive role of the College of Surgeons in setting the standards for accrediting hospitals and training positions within hospitals. The conditions imposed included a requirement that the College establish a public independent review of the criteria for accrediting hospitals for the provision of various surgical training positions.⁷⁶ This condition was supplemented by others involving the participation of the State Health Ministers in the nomination of hospitals for accreditation⁷⁷ and another condition required the College to establish an independent chaired committee to publicly review the tests that medical colleges use to assess overseas trained surgeons.⁷⁸ In *Agsafe* the condition required the independent monitor to report on the progress that the company is making in complying with the conditions imposed by the ACCC in the authorisation annually.⁷⁹ In the *Australian Associated Brewers* authorisation the conditions imposed required an independent review to be conducted of the effectiveness of the Retailer Alert Scheme, which was a system for regulating inappropriately named or packaged alcohol products from the market. The ACCC noted that this scheme was weak as it did not contain a mechanism to enforce compliance and required the Association to report to it on the findings of the review.⁸⁰ In *Australasian College of Cosmetic Surgery* a condition required the Code to be amended for an independent auditor to be appointed by the College to report findings of annual audit checks which included checking the manner in which the Complaints Panel of the College dealt with complaints made to it. The results of these audits are to be reported to the ACCC as well as the College's Code Administration Committee.⁸¹

Some of the conditions go further by getting companies themselves to be reflexive about the way they consider and internalise compliance and the manner in which they relate to both internal and external stakeholders. In a number of the determinations the reviews were directed at evaluating the level of compliance among the participants after consultation with stakeholders and making the results available to both corporation and the ACCC. In *GrainCorp Operations* the corporation, in conjunction with an independent person, was required to develop and implement measures that ensured confidential information was not used improperly.⁸² Similarly in the *International Air Transport Association* authorisation the independent consultant had to view the standard form contracts (that were the subject of authorisation) and consider whether these contracts

76 ACCC, *Royal Australasian College of Surgeons Authorisation*, A90765, 30 June 2003 (ACCC authorisation lodged 28 November 2000) 166.

77 Ibid 167–8.

78 Ibid 172.

79 ACCC, *Agsafe Limited – Minor Variation to Authorisations*, A90680 and A90681, 19 April 2006 (ACCC authorisations lodged 28 October 2005) 61.

80 ACCC, *The Distilled Spirits Industry Council of Australia and others – Authorisation*, A91054 and A91055, 31 October 2007 (ACCC authorisation lodged 8 June 2007) 34–5, 48.

81 ACCC, *Australasian College of Cosmetic Surgery – Authorisation*, A91106, 18 June 2009 (ACCC authorisation lodged 6 November 2008) 57, 79.

82 ACCC, *GrainCorp Operations, AWB and Export Grain Logistics Applications*, A30233, A30234 and A30235, 15 April 2005 (ACCC authorisation lodged 27 September 2004) 80.

could be improved in any way and the company was required to act on the recommendations of this review and report to the ACCC.⁸³

In the *Construction Material Producers Association* authorisation the condition required that the independent consultant undertake a review of the owner drivers' contracts (which was the subject of the authorisation), take into account the views of the interested parties including the Association and relevant Union and report to the ACCC on the outcomes as well as the actions taken by the Association in response to the review.⁸⁴ Likewise in the *North West Shelf* authorisation the condition required an ACCC approved independent compliance auditor to review compliance with the terms of the authorisation and the agreed Protocol. The conditions also required the applicants to implement all of the auditor's recommendations. The auditor was required to report annually on the finding of the Review as well as reporting on any non-compliance of recommendations of the Review.⁸⁵ In all these instances the ACCC is involving others in review of existing processes and in designing better internal regulatory systems, encouraging the corporation to consider these recommendations asking for regular reports on these developments.

IV CO-OPTING STRATEGIES AS EXAMPLES OF NODAL GOVERNANCE

The three strategies discussed above represent attempts at governing markets. However they do not comply with the traditional command and control views of regulation. There appear to be other actors, such as external auditors, with the same power that a traditional regulator would have, and these auditors in conversation with corporations and stakeholders review the corporations' internal management processes and reflect on how compliance can be improved. The corporation listens to these reports as well as those of other stakeholders, who have access to relevant information and at times may want to be very involved in monitoring the corporations. The corporation then determines what it should and can do to bring compliance in line with the spirit of the law and reports to the ACCC and to the public through its website on how it intends to act. Such a view of governance presents many challenges as it does not rely on the hierarchical view of regulation and regulators where the state and regulators occupy the place at the apex of the regulatory hierarchy. Rather it is working from the premise that regulation can be diffuse, can emanate from various nodes and can involve both private and public actors.

83 ACCC, *International Air Transport Association – Authorisation*, A91083, 28 August 2008 (ACCC authorisation lodged 7 March 2008) 20.

84 ACCC, *Construction Material Producers Association Inc – Authorisation*, A91047, 29 August 2007 (ACCC authorisation lodged 5 April 2007) 20.

85 ACCC, *The North West Shelf Project – Authorisations*, A91220, A91221, A91222 and A91223, 8 September 2010 (ACCC authorisations lodged 31 March 2010) 90.

One of the purposes of this paper is to understand the ACCC's co-opting strategies as examples of nodal governance. This first requires a consideration of meaning attached to this term. Nodal governance refers to governance being undertaken by nodes. Governance, defined as the act of governing, is wider than legal regulation of regulatory decision making. It includes the actions of companies and organisations, including associations of activist groups, in regulating the manner in which others may act.⁸⁶ Nodes are the institutions that engage in governance and these nodes can be private or state actors and it is possible for private nodes to regulate corporations or government regulators and visa versa.⁸⁷ For example regulators have always been sensitive to the media and large powerful corporations and are keen on using the media to create a positive spin.⁸⁸ Regulators are being regulated by the media and the media can be viewed as a governance node. Nodes can take many forms and in our discussion may include corporations, associations, industry sectors, government departments, specific professional bodies such as the Corporate Secretaries of Australia or even power exerting cartels. A node as a site of governance has been described as exhibiting four essential characteristics: mentalities – a way of thinking about the matters that the node has emerged to govern; technologies – a set of methods for exerting influence over the course of events at issue; resources to support the operation of the node and exertion of influence; and an institution that enables the directed mobility of resources, mentalities and technologies over time.⁸⁹

It has been argued that nodes themselves do not exercise influence, but do become important when they are part of a network.⁹⁰ Networks allow for information flows and nodes within networks can distribute information and thereby exert control over the action of others. For example the complaints committee of an industry association may use the association's website, an information network, to let everyone know about the complaints processes it will be using to deal with complaints against its members. Interest groups, including consumer advocates and state consumer regulators may scrutinise this information to ensure that the complaints processes are transparent. If these processes are not up to the mark, these nodes may agitate for change and may see fit to access other nodes in other networks including regulators, media, and

86 Peter Drahos, 'Securing the Future of Intellectual Property: Intellectual Property Owners and Their Nodally Coordinated Enforcement Pyramid' (2004) 36 *Case Western Reserve Journal of International Law* 53, 66.

87 See Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' [2001] *Public Law* 329. See also Mark Aronson, 'A Public Lawyer's Responses to Privatisation and Outsourcing' in Michael Taggart (ed), *The Province of Administrative Law* (Hart Publishing, 1997) 40, 63, 69.

88 See Michael Schudson, 'The News Media as Political Institutions' (2002) 5 *Annual Review of Political Science* 249; see also Jonathan Moses, 'Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion' (1995) 95 *Columbia Law Review* 1811. For a discussion of the use of the media by the ACCC see Trade Practice Act Review Committee, Commonwealth of Australia, *Review of the Competition Provisions of the Trade Practices Act* (2003); see also Fred Brenchley, *Allan Fels: A Portrait of Power* (Wiley, 2003) 249–51.

89 Burris, Drahos and Shearing, above n 2, 37–8.

90 *Ibid* 37.

powerful members within the association to support their agitation for change. By doing so, nodes and networks are connecting to govern. In this analysis, the ACCC may be creating new nodes of experts, when it requests that corporations be externally audited; it may be redesigning existing nodes when it changes the codes of conduct of associations to ensure that dispute resolution committees are independent and then asks them to report their decisions; it may also be trying to breathe life into existing nodes by requiring the company to supply information on its website to all stakeholders.

The importance of providing information to consumers to enable rational decision-making has been the backbone of consumer policy in Australia. However the flow of information in this study is not just to consumers, but to a much wider group of stakeholders who may be competitors, non-government organisations, media and members of industry associations. The information can also be accessed anonymously through different networks, most popularly through the corporations' website as the determinations illustrate. There is no doubt that the provision of information can be justified on the basis that it is correcting market failure, especially when it is directed at ceasing misleading or deceptive conduct as in the case of the *Agsafe* authorisation.⁹¹ However it is doing more than that in many instances. By prescribing the type of information to be provided, for example the details about the complaints received and the manner in which the corporation handled them;⁹² or requiring the corporations in consultation with governments to determine the kind of standard of information provision;⁹³ or requiring the association to report to the ACCC on compliance by its members⁹⁴ is going beyond correcting market failure. The corporation here is being called upon to inform stakeholders of its internal management processes, to consult with stakeholders and collate and circulate relevant data to them and also prepare itself for the reaction from all these stakeholders to this information. The quality of information supplied is clearly aimed at more than just 'informing'. Rather its intention is to 'activate' others to participate in regulating markets. As Drahos points out, governance requires information.⁹⁵ What the ACCC is doing here is mandating the use of technology, primarily through the corporation's or association's websites, to dispense relevant information from one node (for example, corporation or association) to other nodes (for example, consumers or other members of the association) in different networks to create new structures of governance. The ACCC may be able to use the threat of revocation of an authorisation and subsequent litigation as the incentive necessary to encourage

91 ACCC, *Agsafe Limited – Authorisations*, A91234, A91242, A91243 and A91244, 27 October 2010 (ACCC authorisations lodged 28 May 2010).

92 See, eg, ACCC, *Showmen's Guild of Australasia – Authorisation*, A90729, 17 December 2003 (ACCC authorisation lodged 25 February 2000); ACCC, *Australasian College of Cosmetic Surgery – Authorisation*, A91106, 18 June 2009 (ACCC authorisation lodged 6 November 2008).

93 See, eg, ACCC, *Royal Australasian College of Surgeons Authorisation*, A90765, 30 June 2003 (ACCC authorisation lodged 28 November 2000).

94 See, eg, ACCC, *Construction Material Producers Association Inc*, A91047, 30 August 2007 (ACCC authorisation lodged 5 April 2007).

95 Drahos, above n 86, 66.

compliance with the conditions it has imposed. For example, this threat may encourage the corporation or association to direct its resources, mentalities and technologies to supply necessary information to stakeholders or to consult these stakeholders about the kind of information that should be supplied. In time there is the possibility that these nodes will commit to keeping such lines of communication open and continue consultation with stakeholders as a matter of course. The manner in which the consumer nodes will respond to the information provided will depend on the way in which the four characteristics operate. The most important characteristic will be whether the consumer node is able to mobilise the necessary resources to be effective.

Tweaking private dispute resolution processes to reflect the characteristics of state based justice systems, by requiring independence and accountable decision-making, available at low cost with clearly marked out appeals processes, has been controversial as demonstrated by the ACCC's and Australian Competition Tribunal's statements on using conditions to create ideal self regulatory systems. In the context of specific authorisations where industry groups have the power to exclude members, mandating fair processes for dispute resolution, can be explained as a means of preserving competition and airing any anti-competitive exclusionary practices. On the other hand instituting such fair processes can also be viewed as establishing nodes of governance.

By instituting dispute resolution systems within corporations or associations, the ACCC can be seen as establishing a node that is responsible for governing specific actors and conduct. There could be more than one node created in this process – the first being the institution that houses the dispute resolution process, which may be the corporate or association body, and the second being the other stakeholder or stakeholders who avail themselves of available information in order to access these dispute resolution systems. The four characteristics can be readily applied to the corporate or association body. Incorporating fair dispute resolution processes can be viewed as creating mentalities or a new way of thinking as it is acknowledging the need for hearing and responding to the complaints of stakeholders, over and above those available under the law or the functioning of market forces. Secondly, it is establishing new technologies by requiring that these dispute resolutions systems be independent, transparent and cheap with inbuilt appeal processes that allow access by stakeholders. Undoubtedly increasing the accountability of these institutions facilitates the exertion of influence over the course of events. Thirdly, by making the creation of such dispute resolution systems a condition of the authorisation requires the corporation to commit resources to the operation of the node and its exertion of influence. The resources required for such tasks will differ depending on the size of the organisation and from the experience of the *Surgeons* authorisation or the *Medicines* authorisations;⁹⁶ it certainly will not be negligible. The fourth

96 ACCC, *Royal Australasian College of Surgeons Authorisation*, A90765, 30 June 2003 (ACCC authorisation lodged 28 November 2000); ACCC, *Medicines Australia*, A90779 and A90780, 14 November 2003 (ACCC authorisations lodged 16 January 2003).

characteristic requires that an institution can orchestrate all the other three characteristics. By linking the authorisation to the condition that dispute resolution systems are independent and accountable and adequately resourced, the ACCC has clearly made the applicant to the authorisation in charge of mentalities, technologies and resources.

Whether stakeholders, such as competitors or consumer groups or government departments and shareholder activists, become effective nodes of governance will depend on their access to resources and institutional commitment.⁹⁷ It is quite possible to see government departments or large consumer advocacy groups making such a commitment and monitoring the manner in which an association that has gained authorisation, functions. For example, government departments, such as the Therapeutic Goods Administration and State Health Departments, may allocate funds in order to monitor whether the corporations in the *Medicines* authorisation and *Generic Medicines* authorisation are complying with the prohibition on advertising prescribed medicines in their Code of Conduct that has been authorised by the ACCC. Similarly competitors, including natural health and vitamins manufacturers, may see advantage in monitoring such conduct and may allocate resources to this end.

The third strategy of external monitoring is both necessary and shrewd. It is necessary because it acknowledges that to be effective, regulation needs to be supported by an enforcement regime. External auditing or monitoring, even though not by the state or state funded regulator, is an attempt at ensuring that there is compliance with the spirit of the law. Such a strategy is shrewd because it does not take on an unachievable task – a regulator striving for efficiency has to avoid the cat and mouse game of repetitive inspections for compliance that can be complex, time consuming, and costly with low rates of detection of breaches. Rather it is preferable to concentrate on creating self regulating markets, whereby the regulator takes on the role of coordinating stakeholders to participate in monitoring corporations. These auditors, lawyers and other members of the epistemological community comprise a node fulfilling the four characteristics discussed above, and these nodal points or technical expertise is being created by the ACCC in order to access the corporation's activities and to develop its capacity for compliance. There is the potential for the monitoring of these external overseers as well, although the success of it will depend on the resources available to the stakeholder nodes.

97 The third characteristic of a node is the resources to support the operation of the node and exertion of influence, discussed above in Part IV.

Figure 4: Role of conditions (totalled for each year) dealing with all three categories in ACCC authorisation determinations from 2001 - 2010

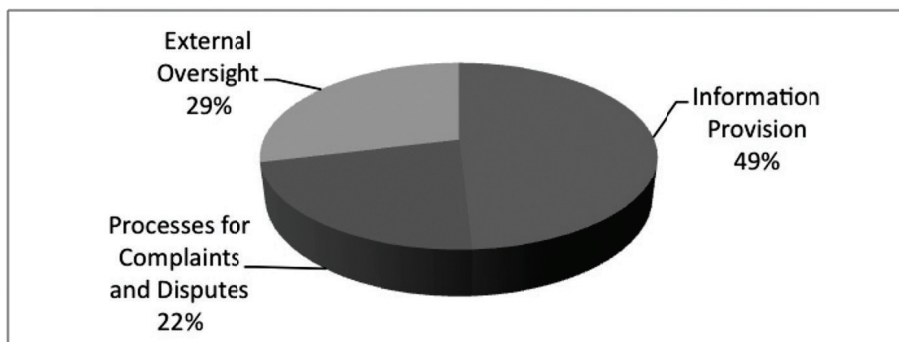


Figure 3 (see above Part III(C)) gives us a powerful picture of the changing use by the ACCC of these three strategies. It is clear that all of these strategies have been part of the ACCC's repertoire since 2001. However, cumulatively their use over the last two years has increased more than any other time in the last decade. Figure 4 above provides a comparison of the way in which conditions in each category have been used. Whereas information provision conditions were used in 29 determinations (of a total of 39 determinations) over the decade studied, external oversight conditions were used in 17, and conditions dealing with processes for complaints and dispute resolution were used in 13 determinations. Together the ACCC has imposed 59 conditions in the 39 determinations studied, with 49 per cent (29 conditions out of a total of 59 conditions) dealing with information provision, 29 per cent (17 conditions out of a total of 59 conditions) dealing with external oversight and 22 per cent (13 conditions out of a total of 59 conditions) dealing with processes for complaints and disputes.

The main concern about nodal governance and hence the use of the conditions power by the ACCC is that it does not facilitate democratic representation. It is argued that nodal governance is not founded on the democratic principles allowing for the representation of the public and participation by citizens of the state. This is a concern that cuts through to the role of the state and the notion of citizenship in democratic societies which is linked to our traditional view of state sovereignty. However as it has been pointed out, nodal governance is not necessarily democratic governance and for it to be democratic the relevant nodes and networks must satisfy tests of representation, accessibility and deliberation.⁹⁸ Providing space in the form of formal submissions and pre-decision conferences as well as informal meetings and conversations with the applicant and stakeholders, as happens in the

⁹⁸ Burris, Drahos and Shearing, above n 2, 47.

authorisation process, is a way of allowing stakeholders' views to be taken into account. Empowering other stakeholders with information to engage in governance, is an example of checking this democratic deficit. Trying to create other nodes such as external overseers who may consult with stakeholders and regulate the corporation is another way of promoting participation and deliberation. The voice of consumer groups in the determinations studied here is indicative that the interests of the public need not be lost. But as pointed out earlier, whether such groups become nodes, depends on resources that are not always readily available.

V CONCLUSION

This article examines the pragmatic role of a regulator in the regulatory state which co-opts others to regulate for better markets. The regulatory state has three dimensions which can be seen as conceptual, organisational and institutional. Conceptually the state is involved in steering rather than rowing of which the regulator has to be mindful. Organisationally the market holds the key to the allocation of resources and the regulators' main role is to guard against market failure. Institutionally, the goal of efficiency is paramount and the shrewd regulator recognises that this is best achieved through co-opting others to carry out regulatory tasks. The ACCC's role in the use of conditions illustrates that it is involved in steering the activities of market participants by setting up nodes to govern corporations by calling them to account. It also demonstrates that the focus on efficiency as the core administrative value has made such pragmatic solutions essential in managing markets. While the co-opting strategy is efficient, it requires well resourced and active nodes and the challenge for the ACCC will be to ensure that this occurs.

This article contends that nodal governance is a useful lens to understand the manner in which the ACCC, which has historically been a strategically sophisticated regulator, has used its conditions power. Nodal governance in this site is effective as the ACCC has been able to provide space for the views of stakeholders and promotes dialogue between actors in the regulatory site. However there exists numerous unanswered questions about nodal governance that provide fertile areas for future research. The most important question at a practical level is how effectively the different nodes will work over time and who will monitor their effectiveness. The most important question at a theoretical level is how nodal governance can incorporate deliberative practices to ensure a place for weaker stakeholders to have voice.